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Private Law: Torts

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but did not select a third, then the latter might be appointed by the senior judge of the Fifth Federal Judicial Circuit. It was held that since no new act of volition was required by the parties with respect to the fixing of the price, the agreement was binding and could not be disregarded. The decision appears to be a sound reflection of recognized civilian principles and is also harmonious with the modern liberal approach reflected in the Uniform Commercial Code.[9] It seems very clear that the parties did intend to bind themselves and were meticulous in trying to avoid the rule that nullifies a projected sale where the price is left to be fixed by arbitrators to be chosen by the parties and either party fails to do so.

TORTS

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DUTY OF CARE

Negligence as Balancing Process

Occasionally the facts of a controversy invite a sharp focus upon the essential balancing process that lies at the heart of negligence. Conduct involving a chance of injury should be characterized as negligent conduct whenever the chance is found to be *unreasonable.* Ordinarily "big" chances are more likely to be regarded as unreasonable than are "little" chances. But even a very small chance involving only a remote possibility of causing injury may be recognized as unreasonable, and hence negligent, if it is a "useless" chance—that is to say, if nothing worthwhile is to be gained by taking it.[1] Particularly is this true when, in addition, the risk is of such a nature that the consequences would be highly serious if it should materialize. The case that suggested all this ruminating is *Allien v. Louisiana Power & Light Co.*[2] The conduct involved was the maintenance by defendant of an uninsulated high voltage electric line at a height of twenty-eight feet above the surface and at a distance of twenty-six feet from an abandoned oil well. The picture thus presented was not one of obvious danger, and there was little likelihood of injury to anyone on the ground in the absence of some rare circumstance. Such an unexpected situation did arise, however, when operators of an oil rig mounted on a truck at-

9. *Cf.* UNIFORM COMMERCIAL CODE § 2-305.

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1. *See* the excellent discussion in Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

2. 202 So.2d 704 (La. App. 3d Cir. 1967).

tempted to raise the rig to its full height of thiry-five feet. Contact with the line resulted, and the deceased, a bystander, was electrocuted through contact with a guy wire supporting the mast of the rig.

The considerable height of the wire and the remoteness of the location would both suggest that the likelihood of injury was too small to justify a finding of negligence on the part of the electric installer. Plaintiff's counsel, however, emphasized the fact that the initial installation of the pole and wire in question was due to a mistake as to its proper location. It was shown that upon discovery of the mistake the transformers were moved, but the highly energized uninsulated wire was left in place as a useless appendage extending a distance of 185 feet leading to no destination. It was this wire with which the fatal contact was made. The court observed that although the possibility of danger was slight, the justification for maintaining the condition was negligible, particularly in view of the fact that the risk involved exposure to a lethal charge of nearly 14,000 volts.

Duty to Emotionally Unstable Employee

Because of the infrequency of negligence claims by employees against their own employers we are tempted to lose sight of the fact that a substantial range of non-statutory duties are owed the servant by his master. Although the most familiar of these is the obligation to furnish a reasonably safe place to work, and to supply adequate tools,[3] the employer is equally under a duty to avoid assigning to an employee a work task that is so beyond his competence that it involves a serious risk of injury. The assigned job may require more physical strength or more skill and training than the employee possesses.[4] Recently the Court of Appeal for the First Circuit recognized that the employer is under a similar duty to refrain from exposing the employee to stresses which he is aware may be harmful to the worker's mental or emotional welfare. In *Sampson v. Southern Bell Telephone & Telegraph Co.*[5] the employee complained that his employer assigned him intricate, complicated, and confusing tasks while fully informed of plaintiff's precarious mental condition and in contravention of advice from the employee's physician. The details of the alleged negligence were not fully presented because the trial court held

3. *See* W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE Ch. 1, § 2 (1951).

4. Myhan v. Louisiana Light & Power Co., 41 La. Ann. 964, 6 So. 799 (1889); James v. Rapides Lumber Co., 50 La. Ann. 717, 23 So. 469 (1898).

5. 205 So.2d 496 (La. App. 1st Cir. 1967).

that the exclusive remedy provision of the Workmen's Compensation Act[6] precluded the maintenance of a tort action against the employer. The court of appeal reversed this holding and remanded the controversy for the presentation of the facts on which the wrongdoing was allegedly based. The court's position is clearly correct in principle. No arbitrary distinction should exist between negligence affecting physical strain and negligence that threatens to bring about disabling mental and emotional stress. The result in either event can be an incapacitated worker. It is to be anticipated that in claims of this nature there are certain to arise puzzling questions of assumption of risk, causation, and possibly contributory negligence; but this prospect need not serve to defeat recovery arbitrarily.

Illegal Sale of Ammunition to Minor

A recent decision by the Court of Appeal for the Fourth Circuit has announced that a merchant selling shotgun shells to fourteen-year old children is not responsible for the subsequent accidental shooting of one such child by the other.[7] The claim was based upon violation of a criminal statute condemning the sale of "any firearm or other instrumentality customarily used as a dangerous weapon" to anyone under the age of twenty one years.[8] The court rejected the criminal statute as the basis of liability because the sale in the instant case was of ammunition for firearms, rather than the sale of the weapons themselves. The court also dismissed the plaintiff's claim of liability based on negligence which might arise irrespective of the terms of the criminal statute. Insofar as liability existing independent of the statute is concerned, the court's action in dismissing the claim follows the pattern in other jurisdictions. Liability has seldom been imposed when the purchaser was as old as fourteen years.[9] The question as to whether or not the criminal statute should be completely ignored (despite the fact that it was not literally applicable) is more difficult. In this connection it is interesting to note that the criminal statute in question, imposing an unqualified prohibition of the sale of firearms, appears in that division of the Criminal Code dealing with offenses affecting the *health* and *morals* of minors. It is significant that the sale of firearms and the sale of intoxicating liquors are prohibited in the same sentence. It appears likely that the statute was directed against

6. LA. R.S. 23:1032 (1950).
7. Schmit v. Guidry, 204 So.2d 646 (La. App. 4th Cir. 1967).
8. LA. R.S. 14:91 (1950).
9. Liability for sale to children up through 12 years is frequent; *see* Annot., 20 A.L.R.2d 119 (1951).

the risk of intentional violence and affrays between minors rather than the risk of purely accidental shootings. For this reason the court was justified in rejecting any analogy to the criminal provision.

Responsibility for Negligence of Nurses

The established Louisiana position that the tort immunity enjoyed by a charitable institution is not available to its liability insurer[10] has obliged our courts on several occasions to scrutinize sharply situations where alleged misconduct of a nurse or other skilled attendant forms the basis of a personal injury claim by a patient. If the act or omission in question is one for which the employer hospital could be held under respondeat superior, then the hospital's only defense is its charitable immunity, which is personal to the institution itself. If, on the other hand, at the time of the accident the nurse or attendant is to be regarded as something akin to an independent contractor performing professional services of a skilled character, rather than merely following hospital directions, then there is no basis for any hospital liability. Nothing short of careless selection could ground hospital responsibility under these circumstances. The nurse is merely an independent expert whose services are made available to the patient by the institution. This complete absence of a cause of action is available, of course, to the liability insurer as well.[11]

A further distinction closely allied to the above concerns the relationship between the nurse, the attending surgeon or physician, and the hospital. Here the borrowed servant doctrine enters to complicate the picture, for the nurse's task that results in injury may be non-professional, non-skilled, and one that normally would subject the hospital to liability, yet she may be performing it under the exclusive direction of the surgeon or physician, thus terminating for the time being her status as hospital servant and shifting respondeat superior liability solely upon the surgeon for whom she was acting.[12]

The necessity for resort to such distinctions arises whenever

10. Messina v. Societe Francaise De Bienfaissance, 170 So. 801 (La. App. Orl. Cir. 1936).

11. As a practical matter, hospital liability insurers avoid responsibility in the situation where the employee is acting as a skilled, independent contractor by expressly excluding liability based on fault in rendering medical, surgical or nursing services (as opposed to merely "administrative" or non-skilled functions). Such a clause was involved in the case under discussion here, Grant v. Touro Infirmary, 207 So.2d 235 (La. App. 4th Cir. 1968).

12. Jordan v. Touro Infirmary, 123 So. 726 (La. App. Orl. Cir. 1922); Messina v. Societe Francaise De Bienfaissance, 170 So. 801 (La. App. Orl. Cir. 1936).

a gauze memento is left in the body of a patient following surgery. The established procedure with reference to surgical sponges is a coordinated counting operation executed by two nurses. If the counts fail to tally, the surgeon is notified and a hunting expedition is initiated. Otherwise the surgeon customarily satisfies himself by confirming the tally of the nurses' counts. Several Louisiana decisions confirm the proposition that proof of the unexpected presence of the sponge following the operation justifies a finding that there was error in the count.[13] Since this points the finger of responsibility toward the nurses, the question arises, whose servants (if anyone's) were they at the time?

The Court of Appeal for the Fourth Circuit recently held that the counting of the sponges was not a professional act of such character that the nurses should be considered as independent contractors.[14] For this reason their negligence was attributable to the hospital, their employer. Although the hospital successfully avoided personal liability by means of its plea of immunity, this defense was not available to the charity's liability insurer.

In view of the fact that the nurses were regarded as agents of the hospital, rather than of the presiding surgeon, the latter could not be held responsible under respondeat superior. The claim was made, however, that the presence of the sponge within the patient's body indicated independent negligence on the part of the surgeon. It was claimed that he was not relieved of the duty of making a search into the abdominal cavity before closing the incision. However, affirmative medical testimony offered on behalf of the dependant surgeon indicated that reliance upon the count of the nurses was the accepted practice followed by surgeons in the New Orleans community, where the operation took place. Apparently this issue of the possible independent negligence of the surgeon had been submitted to the jury at the trial and it had found a verdict favorable to the defendant.[15] Under these circumstances the affirmance of the judgment favorable to the surgeon is expected. Chasez, J., dissented both from the holding that the nurses were administrative agents of the hospital rather than borrowed servants of the surgeon and also from the affirmance of the verdict that there could be no inference of personal negligence on the part of the surgeon. A writ of certiorari has been granted by the Supreme Court.

13. Danks v. Maher, 177 So.2d 412 (La. App. 4th Cir. 1965).

14. Grant v. Touro Infirmary, 207 So.2d 235 (La. App. 4th Cir. 1968).

15. In some jurisdictions, proof of a professional custom to rely upon the nurses' sponge count has not been determinative of the surgeon's negligence; *e.g.*, Davis v. Kerr, 239 Pa. 351, 86 A. 1007 (1913).

PROOF OF NEGLIGENCE

Res Ipsa Loquitur

The observation that the doctrine of res ipsa loquitur is readily available in situations where the plaintiff's injury arose from a highly hazardous activity in which the defendant was engaged[16] was reconfirmed in *Tassin v. Louisiana Power & Light Co.*[17] Plaintiff, an employee of a cotton gin, claimed that he was blinded when a power line carrying a heavy load of electricity suddenly fell without explanation, causing a blinding flash. The defendant maintained that the falling of the line did not exclude the reasonable possibility that the fall was caused by some factors apart from defendant's negligence. The court pointed out that it was not necessary that the plaintiff point to the precise act or neglect to which the accident should be attributed. It is sufficient, it observed, that the facts shown suggest that negligence of the defendant, rather than other factors, is the most plausible explanation of the accident.

In this case it seems not unlikely that the line fell because of an overload of current at the time. For fifteen days prior to the date of the accident there had been an average demand of power highly in excess of the demand that was anticipated at the time the line was completed. This suggests the question as to who has the responsibility to maintain a going record of the amounts of current required from time to time so as to determine the suitability of the line to carry such increased load. When the case was before the Court of Appeal for the Third Circuit[18] there was a dissent by Justice Hood, who was apparently of the opinion that the obligation of the power company to enlarge the capacity of its line arises only after it has received affirmative notice from the power user. The majority opinion would seem to indicate by implication that it is a duty of the power company to maintain a supervision of the quantity of power consumed and to make the adjustments necessary under its own motion.

Loftin v. Travelers Ins. Co.[19] presents a controversy of a type that is becoming familiar in Louisiana. A customer in a large self-service grocery store stepped in a puddle of clear water, slipped and fell to the floor, sustaining injuries. The sole basis

16. *See* cases collected in Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 95-97 (1941).

17. 250 La. 1016, 201 So.2d 275 (1967).

18. Tassin v. Louisiana Power & Light Co., 191 So.2d 338 (La. App. 3d Cir. 1966). The appellate court's opinion was noted in 27 LA. L. REV. 853 (1967).

19. 208 So.2d 739 (La. App. 3d Cir. 1968).

for a claim of negligence was failure by the proprietor to inspect the premises for dangerous conditions resulting from the conduct of customers. A holding by the district court that the store's inspection procedures were inadequate for an establishment as large as this one was reversed on appeal. Detailed evidence was introduced by the defendant concerning its inspection practices. The sole basis of the difference of opinion between the majority of the court of appeal and the dissenting Judge, Culpepper, was the question of the extent of the duty of inspection owed by the proprietor.[20] The facts were in no way disputed or in doubt. There remained for the court only the policy question—were the defendant's practices adequate to the need? The problem, however, was discussed by the majority as one involving res ipsa loquitur. This attack probably resulted from the fact that it was defendant, rather than plaintiff, that introduced the details of the proprietor's inspection practices. The majority opinion suggests that the trial court's conclusion that the practices of the defendant were not reasonably adequate amounted to an application of res ipsa loquitur and an improper casting of the burden of disproving negligence on the defendant. It is difficult for this writer to appreciate how the discussion of res ipsa loquitur becomes relevant. Resort to this Latin phrase is usually appropriate when a court is seeking to determine whether an inference of negligence can properly be drawn from the mere occurrence of the accident. If, in the present controversy, no evidence of defendant's practices had been introduced, the court might refer to res ipsa loquitur in deciding what inference could be or could not be, drawn. If it should determine that negligence cannot properly be assumed from the plaintiff's spare showing, it might appropriately add that the plaintiff has the task of proving her case and that the burden was not upon the defendant to introduce any evidence affirmatively exonerating himself. But once the defendant has elected to describe his practices in the course of the trial, as here, the only remaining task for the court is to appraise these practices and give judgment for the plaintiff, or refuse it, accordingly.

DUTY OF OCCUPIER OF PREMISES

Child Trespasser

The recent opinion in *Duxworth v. Pat Caffee Contractor,*

20. The dissenting opinion includes an excellent comment on the more exacting duty of inspection owed by the proprietor of a large self-service grocery than would be owed in a smaller establishment. *Id.* at 742-45.

Inc.,[21] is of particular interest because of its realistic approach to the so-called "attractive nuisance" doctrine. A six and a half year old boy suffered damages to his face and mouth while he was playing underneath a heavy machine trailer which he and other children were tilting in seesaw fashion. In allowing recovery the court of appeal carefully pointed out that the question involved was whether or not the defendant was negligent in its failure to leave the device in a more secure position when it was aware of the children in the vicinity of the machinery after working hours. As factors bearing upon the issue of negligence, the court pointed to the anticipated presence of children and the ease with which the danger could have been reduced or obviated. The court emphasized that a finding of "attractive nuisance" does not obviate the essential character of the controversy as one involving the presence or absence of negligence.[22] The fact that the agency that inflicted the injury was an object which was attractive to children is important primarily because in such cases there is an increased likelihood of the presence of children and consequently there is greater chance of injury. The opinion is excellent and deserves careful study.

Social Guest

Ten years ago in *Alexander v. General Acc. Fire & Life Assur. Co.*[23] the Court of Appeal for the Third Circuit broke with the common law tradition and announced that a social guest invited into defendant's residence was entitled to the same duty of protection as is afforded a business guest. In 1965 the *Alexander* decision was quoted with approval by the Court of Appeal for the Fourth Circuit,[24] and last year the Supreme Court expressly approved the new approach.[25] The Louisiana courts are not alone in their rejection of the accepted common law position with respect to the duty owed social guests. Very recently the Supreme Court of California went even further and

21. 209 So.2d 497 (La. App. 4th Cir. 1968).

22. For further discussion of this issue, *see The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Torts*, 26 LA. L. REV. 510, 524-26 (1966).

23. 98 So.2d 730 (La. App. 1st Cir. 1957).

24. Pampas v. Cambridge Mut. Fire Ins. Co., 169 So.2d 200 (La. App. 4th Cir. 1964) (child burned by hot coffee when it pulled a coffee maker off a table by its attached wire; claimed that grandparent was negligent in failure to anticipate the child's action; court approved the *Alexander* rule but found that grandparent was not negligent).

25. Foggin v. General Guar. Ins. Co., 250 La. 347, 195 So.2d 636 (1967). (The defendant had nailed a plank across the gateway to his back yard to prevent his dog from escaping. His mother visited on Thanksgiving and was not aware of the presence of the plank, tripped on it, and was injured. The Supreme Court followed the *Alexander* decision, announced the broad rule and allowed recovery despite the claim of contributory negligence.)

abandoned the entire traditional scheme whereby persons entering the premises of others are classified as trespassers, licensees, or business guests and are accorded distinct duties appropriate to their particular status.[26] From now on, said the California court, a general duty of reasonable care is owed to all, and the question as to whether they are invited or uninvited, or whether they come for pleasure or for profit, is important only as one factor in fixing the demands of reasonable care in the particular case. This broad decision was prompted by a situation involving an injury to a social guest.

Since it appears that a doctrinal revolution may fairly be under way at least in the jurisdictions of California and Louisiana and since it is a fairly safe conjecture that many other jurisdictions will be tempted to follow suit, we might pause to inquire as to what *is* the common law position that is threatened with abandonment, and what *are* the changes being made by the new decisions? As I understand the matter, the differences in the duties owed the business guest and the licensee are twofold: first, the business guest is entitled to assume in the absence of a warning that the premises have been subjected to an inspection and have been put into reasonably safe condition.[27] The licensee or social guest, on the other hand, cannot assume that any special preparation has been made for his reception. He is, however, entitled to a warning of any unsafe condition of which the occupier is aware.[28] Furthermore, a dangerous condition is regarded as known to the occupier whenever he has become aware of the raw observable facts themselves even though he has concluded erroneously that the condition presents no potentiality of danger.[29] When thus viewed, the advantage enjoyed by the business guest over the social visitor is minimal; it is of practical importance only in those cases where there is no awareness by the proprietor that there exists any condition that could be dangerous to the unwary. It may be added that the dangerous condition is regarded as known to the occupier if he once was aware of it but has since forgotten.[30] Here, again, the licensee or social guest is entitled to the same warning as the business patron. Now the interesting feature common to all the Louisiana and California decisions mentioned above is that they involved dangers of which the occupier had full knowledge and had

26. Rowland v. Christian, 70 Cal. Rptr. 97, 443 P.2d 561 (Sup. Ct. 1968).
27. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 398 (3d ed. 1964).
28. *Id.* at 385; RESTATEMENT (SECOND) OF TORTS § 342 (1965).
29. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 389 (3d ed. 1964).
30. RESTATEMENT (SECOND) OF TORTS § 342, at 211 (1965).

yet failed to warn.[31] Hence recovery would have been justified in each instance without the necessity of any change of doctrine. The most recent of the Louisiana cases, *Champagne v. Northern Assur. Co.*[32] announcing the new rule is illustrative. Plaintiff was injured while using a power saw at the invitation of defendant, his father-in-law, at the latter's residence. Admittedly defendant was present at the time of the accident and was aware of danger from the device (which he had constructed himself), and he knew that his son-in-law would not discover the partially covered rotating saw blade. Even as a social guest under the orthodox common law rule he was entitled to a warning, which was not forthcoming.

There remains, however, one important feature distinguishing the duty owed the business guest from the duty owed the social visitor: we have observed that the latter is not entitled to expect that advance preparation has been made in anticipation of his coming nor can he rely upon any inspection having been made by the proprietor for his benefit. Hence he is expected to be on guard for his own protection, and the proprietor, knowing this, need not warn him of any defect which a thoroughly alert visitor or licensee would discover for himself. The business guest, on the other hand, can rely upon the assumption that some measure of protection for his reception has been taken; hence he is not obliged to be on guard for his own safety. It follows that when the distinction between business guest and social guest is abandoned by a court, the effect may be a more tolerant attitude toward any inadvertence with which the visitor may be charged. However, issues concerning the plaintiff's own self-protection are usually discussed as matters of contributory negligence or assumption of risk. It is noteworthy that in the *Alexander* decision (the first Louisiana case to break away from the common law) the court, despite its venturesome announcement of new policy, ended by denying recovery to defendant's mother-in-law who had slipped on a rug while visiting. It found that she had assumed the risk, since she must have been aware of the danger from past knowledge of the condition of the rug.

31. Alexander v. General Accident Fire & Life Assur. Co., 98 So.2d 730 (La. App. 1st Cir. 1957); Pampas v. Cambridge Mut. Fire Ins. Co., 169 So.2d 200 (La. App. 4th Cir. 1964); Foggin v. General Guar. Ins. Co., 250 La. 347, 195 So.2d 636 (1967); Rowland v. Christian, 70 Cal. Rptr. 97, 443 P.2d 561 (Sup. Ct. 1968).

32. 210 So.2d 68 (La. App. 1st Cir. 1968).

Business Guests or Patrons

The duty owed by the occupier of business premises to his business customers rests upon the fact that the occupier is in control of the premises which he has impliedly invited the customer to enter. For this reason there is no duty to maintain in safe condition the premises in the possession of other persons which are merely adjacent to the occupier's premises or facilities. For this reason the Court of Appeal for the Third Circuit has properly held that the Southern Bell Telephone Company could not be subjected to liability for a dangerous condition of the front porch of a store where the phone company had secured permission to install its telephone booth.[33] The accident occurred when plaintiff, a person proposing to use the telephone, leaned against the post supporting the roof of the porch. The post was in dangerous condition and the plantiff fell, injuring himself. The liability would be that of the store owner, not the phone company.

One may profitably conjecture whether or not there might have been liability in this case if the phone company had had actual knowledge of the danger even though it could not have been said that it existed on premises within their possession.

Contributory Negligence

Recently the Supreme Court imposed liability upon a youthful lifeguard at a municipal pool and upon the public body itself for failure to make reasonable efforts to rescue a fifteen-year-old inexperienced swimmer.[34] The negligence of the lifeguard is beyond question. Had he been alert he would have discovered the youth's predicament at the bottom of the pool in time to have saved him. Even after the guard was expressly told by a companion of the deceased's peril he refused to go to his assistance, being apparently in a state of disbelief that is difficult to appreciate.

There should be no obstacle to recovery in such case. The defendants urged, however, that recovery on behalf of deceased was precluded by the latter's contributory negligence; and the carelessness of the fifteen-year-old deceased (who ventured into deep water although he was unable to swim) was fairly clear. The court, assuming that contributory fault of the drowned patron would normally defeat a recovery, nevertheless avoided

33. Green v. Southern Bell Tel. & Tel. Co., 204 So.2d 648 (La. App. 3d Cir. 1967).

34. Williams v. City of Baton Rouge, 214 So.2d 138 (La. 1968).

the effect of the boy's negligence by finding that the defendant lifeguard had the last clear chance to save the victim. In order to adopt this attack it was necessary to deal with the temporal sequence between the time at which the patron became helpless and the time when his danger was obvious to the lifeguard.

This writer suggests that the right to recovery in cases of this kind should not be made to depend upon the fortuities of last clear chance. Should contributory negligence ever operate as a defense in a suit based upon the inattention of a professional lifeguard? If the patrons of a public pool could aways be expected to shepherd their own welfare with the care of the mythical reasonable man there would be little basis for the universal requirement of lifeguards at such places. The expectable risk of heedlessness by patrons is the most prominent danger that faces the proprietor of a pool. He therefore must undertake to afford a safeguard against this very hazard and to watch over those who get into danger irrespective of whether they are or are not to blame for their own predicament. If the duty is to protect the patron against the consequences of his own carelessness, it would seem highly inappropriate to allow the defendant to set up that same carelessness as a bar to recovery.[35] There is no policy whatever to support the defense of contributory negligence in a case of this kind, and resort to the confusion of last clear chance should be unnecessary.

TORTS—TRAFFIC CASES

*William E. Crawford**

In *Monger v. McFarlain*,[1] the court held the defendant's conduct to be negligent *per se*, but found no liability because the negligence was passive, which, as two dissenting opinions pointed out, is contrary to the landmark case of *Dixie Drive-it-Yourself*.[2] A casenote[3] in the prior issue discusses the problem thoroughly.

35. *Cf.* Dixie Drive It Yourself System v. American Beverage Co., 242 La. 471, 137 So.2d 298 (1962) (duty to avoid obstructing highway exists to protect against the risk that car approaching later might strike obstruction through driver's failure to be alert; although the problem in this case centered on the issue of proximate cause, the problem is basically the same where contributory negligence is involved: Whenever the purpose of the defendant's duty is to protect against the prospect of someone else's carelessness, that same carelessness should not be asserted by defendant in order to defeat recovery.)

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1. 204 So.2d 86 (La. App. 3d Cir. 1967).

2. Dixie Drive-it-Yourself System v. American Beverage Co., 242 La. 471, 137 So.2d 298 (1962).

3. Note, 29 LA. L. REV. 167 (1968).